Fam Sin Nin v Ho Kam Phaw & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R3–24–49 OF 1996
NIK HASHIM JC
23 JUNE 1997

Legal Profession *— Practice of law — Partnerships between solicitors — Dissolution of partnership — Appointment of solicitor as an agent to operate the clients' account and repay all monies to former clients and thereafter close the accounts — Whether Bar Council was empowered by the Legal Profession Act 1976 to take control of the clients' account and clients' properties in the former firm and appoint a third party to operate the clients' account — Whether High Court has inherent powers to appoint the agent to prevent injustice — Whether need for extra security — Whether application by intervener client for the return of money together with interest accrued from the clients' account of the dissolved firm should be allowed — Whether application for an order that partners give effect to a High Court order to transfer a trust fund from the clients' account should be allowed — Accountant's Report Rules 1990 — Legal Profession Act 1976 ss 88, 89, 80, 91 & 92 — Solicitors' Account Rules 1990 — Solicitors' Account (Deposit) Rules 1990*

Legal Profession *— Malaysian Bar — Appointment of agent to operate clients' account of dissolved partnership — Whether Bar Council was empowered by the Legal Profession Act 1976 to take control of the clients' account and clients' properties in the former firm and appoint a third party to operate the clients' account and repay all monies to former clients and thereafter close the accounts*

The applicant and the first respondent were at the material time advocates and solicitors practising in partnership under the name and style of 'Ho & Fam'. On account of differences which arose, they dissolved the firm. However, the funds due to the clients had not been paid out. There were also claims by the clients for interest for non-investment of funds. Neither of the former partners took over the dissolved firm as a going concern as each partner had set up his own firm. All cheques to be signed by the former partners before any payment could be made and the bank had frozen all accounts. Each of the former partners was in charge of different areas of the firm and each did not know what were the other sums paid by or owing to the clients.

The applicant sought the Bar Council's intervention to take control of the clients' account and clients' properties in the former firm and appoint a third party to operate the clients' account and repay all monies to former clients and thereafter close the accounts. The Bar Council refused. Accordingly, the applicant applied to court seeking the appointment of an advocate and solicitor to operate the clients' account of the dissolved firm with the various banks and for one Leong Khai Yan, an advocate and solicitor to ascertain the monies in such accounts due to the various clients and repay the clients their monies. Counsel for the first respondent objected to the appointment of the solicitor on the ground that there was no provision allowing such appointment and that the Bar Council could appoint under the Legal Profession Act 1976 ('the Act').

A In another application, the second respondent, an intervener client, claimed for the return of RM585,000 together with interest accrued from the clients' account of the dissolved firm. In the third application, the third respondent — another intervener client — applied for the court to order both partners to give effect to a High Court order to transfer a trust fund of RM202,735.62 together with interest accrued from the clients' account of the dissolved firm to Amanah Raya Bhd. The first respondent objected and argued that the application was not necessary as there was already a court order directing the transfer of the fund.

C **Held**, allowing the applications:

(1) Under O 92 r 4 of the Rules of the High Court 1980 ('the RHC'), the High Court has inherent powers to appoint a solicitor as the agent of both former partners in order to prevent injustice. On the other hand, the Bar Council is not empowered by the Act to intervene and take control of the clients' account and properties and appoint someone to operate the clients' account and repay all monies to the former clients and to close the accounts. Therefore, the provisions of ss 88–92 of the Act had no relevance to the present case since the partners had not been guilty of dishonesty in connection with advocates and solicitors' practice; neither were they undischarged bankrupts nor dead for which in such situations, the Bar Council is then empowered to intervene (see p 81H–I); *Esther Tan Wooi Hong & Ors v Saujana Holding Sdn Bhd & Ors* [1997] 1 AMR 697 and *Tan Lay Soon v Kam Mah Theatre Sdn Bhd* [1992] 2 MLJ 434 followed.

(2) Since only a solicitor can operate the clients' account under the Solicitors' Account Rules 1990, a solicitor, therefore, may be appointed as the agent of the former partners (see p 82B).

(3) There was no need for extra security to be imposed on the appointment as the agent to be appointed is an experienced advocate and solicitor. Furthermore, the provisions of the Act and the rules made thereunder are more than sufficient security to take care of him in the discharge of his duty. In this case, it would be in the interest of justice that the agent be appointed to operate the clients' account of the dissolved firm and all monies therein be paid to the respective clients and the accounts audited. Moreover, interests would be served for both the first respondent and the applicant as well as the clients and of the profession that the clients' account of the dissolved firm be audited and thereafter the accounts could be closed once and for all (see p 82C–E).

(4) The application for the money to be returned to the second respondent was allowed. However, the court was not empowered under the RHC to allow the interest accrued from the clients' account of the dissolved firm. Any claim for interest should be made in other proceedings after the rate of interest has been

fixed by the Bar Council in accordance with r 2(2) of the Solicitors' Account (Deposit Interest) Rules 1990 (see p 82F–G). A

(5) The objection by the first respondent that the application of the third respondent was not necessary had no merit. It was true that there was a court's order but unless the first respondent agreed to execute a letter of authorization for the bank to transfer the money to Amanah Raya Bhd, there would be no way the money could be paid out from the clients' account. Therefore, in order to give effect to the High Court order, the application by the third respondent must be allowed (see pp 82I and 83A). B

C

[Bahasa Malaysia summary

Pemohon dan penentang pertama pada masa material adalah peguambela dan peguamcara yang mengamal di bawah nama dan gaya 'Ho & Fam'. Atas perbezaan yang timbul, mereka membubarkan firma itu. Walau bagaimanapun, wang yang harus dibayar kepada klien telah tidak dibayar. Terdapat juga tuntutan oleh klien untuk faedah atas wang yang tidak dilaburkan. Tiada seorang daripada bekas rakan kongsi telah mengambil alih firma yang dibubarkan sebagai perniagaan yang berterusan disebabkan setiap rakan telah menubuhkan firma sendiri. Semua cek hendaklah ditandatangani oleh bekas rakan kongsi sebelum apa-apa bayaran boleh dibuat dan bank telah membekukan semua akaun. Setiap rakan kongsi bertanggungjawab atas bahagian firma yang berbeza dan setiap satu tidak tahu tentang jumlah lain yang dibayar oleh atau yang terhutang kepada klien. D E

Pemohon meminta pertolongan Majlis Peguam untuk mengambil alih akaun klien dan harta klien dalam bekas firma dan melantik pihak ketiga untuk mengendalikan akaun klien dan membayar semula semua wang kepada bekas klien dan selepas itu menutup akaun. Majlis Peguam enggan berbuat demikian. Oleh itu, pemohon membuat permohonan kepada mahkamah meminta supaya seorang peguambela dan peguamcara dilantik untuk mengendalikan akaun klien di firma yang dibubarkan dengan beberapa bank dan untuk seorang bernama Leong Khai Yan, seorang peguambela dan peguamcara untuk memastikan jumlah dalam akaun itu yang harus dibayar kepada klien-klien dan membayar semula wang kepada klien. Peguam penentang pertama membantah terhadap pelantikan peguamcara atas alasan bahawa tiada peruntukan yang membenarkan pelantikan demikian dan bahawa Majlis Peguam boleh melantik di bawah Akta Profesyen Undang-Undang 1976 ('Akta tersebut'). F G H

Dalam permohonan lain, penentang kedua, seorang klien pencelah, menuntut supaya jumlah sebanyak RM585,000 dikembalikan bersama faedah yang terakru daripada akaun klien di firma yang dibubarkan. Dalam permohonan ketiga, penentang ketiga — seorang lagi klien pencelah — memohon kepada mahkamah supaya memerintah kedua-dua rakan memberi kesan kepada perintah I

A Mahkamah Tinggi untuk memindah suatu tabung amanah yang berjumlah RM202,735.62 bersama faedah yang terakru dari akaun klien di firma yang dibubarkan kepada Amanah Raya Bhd. Penentang pertama membantah dan menghujahkan bahawa permohonan adalah tidak perlu kerana sudah pun terdapat perintah mahkamah yang mengarahkan pemindahan tabung.

B

Diputuskan, membenarkan permohonan-permohonan:

(1) Di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), Mahkamah Tinggi mempunyai kuasa sedia ada untuk melantik seorang peguamcara sebagai ejen kedua-dua rakan bagi
C menghalang ketidakadilan. Sebaliknya, Majlis Peguam tidak diberi kuasa oleh Akta tersebut untuk mengganggu dan mengambil alih akaun klien-klien dan harta mereka dan melantik seseorang untuk mengendalikan akaun klien dan membayar semula semua wang kepada bekas klien dan untuk menutup akaun-akaun. Maka,
D peruntukan ss 88–92 Akta tersebut tidak mempunyai sebarang kerelevanan kepada kes ini kerana rakan kongsi telah tidak didapati bersalah atas ketidakjujuran berkaitan dengan amalan peguambela dan peguamcara; mereka juga bukanlah bankrap yang tidak dilepaskan atau sudah meninggal dunia yang mana dalam keadaan sedemikian, Majlis Peguam berkuasa untuk masuk campur (lihat
E ms 81H–I); *Esther Tan Wooi Hong & Ors v Saujana Holding Sdn Bhd & Ors* [1997] 1 AMR 697 dan *Tan Lay Soon v Kam Mah Theatre Sdn Bhd* [1992] 2 MLJ 434 diikut.

(2) Oleh kerana hanya seorang peguamcara boleh mengendalikan akaun klien-klien di bawah Kaedah-Kaedah Akaun Peguamcara
F 1990, maka seorang peguamcara boleh dilantik sebagai ejen bekas rakan kongsi (lihat ms 82B).

(3) Tiada keperluan untuk jaminan tambahan dikenakan ke atas pelantikan kerana ejen yang dilantik adalah seorang peguambela dan peguamcara yang berpengalaman. Tambahan pula,
G peruntukan Akta tersebut dan kaedah-kaedah yang dibuat di bawahnya adalah jaminan yang lebih daripada mencukupi untuk mengawalnya dalam menjalankan tugas. Dalam kes ini, adalah dalam kepentingan keadilan bahawa ejen dilantik untuk mengendalikan akaun klien-klien firma yang dibubarkan dan semua wang dibayar kepada klien masing-masing dan akaun
H diauditkan. Tambahan pula, kepentingan akan dipenuhi untuk penentang pertama dan pemohon serta klien-klien dan profesyen sekiranya akaun klien dengan firma yang dibubarkan diauditkan dan akaun ditutup untuk kali terakhir (lihat ms 82C–E).

(4) Permohonan supaya wang dikembalikan kepada penentang kedua
I dibenarkan. Namun demikian, mahkamah tidak berkuasa di bawah KMT untuk membenarkan faedah yang terakru daripada akaun klien dengan firma yang dibubarkan. Sebarang tuntutan untuk faedah harus dibuat dalam prosiding lain selepas kadar

faedah telah ditetapkan oleh Majlis Peguam menurut k 2(2) Kaedah-Kaedah Akaun (Faedah Deposit) Peguamcara 1990 (lihat ms 82F–G).

(5) Bantahan oleh penentang pertama bahawa permohonan oleh penentang ketiga adalah tidak perlu tidak mempunyai merit. Adalah benar bahawa terdapat perintah mahkamah tetapi melainkan penentang pertama bersetuju melaksanakan surat pemberikuasaan untuk bank memindah wang itu kepada Amanah Raya Bhd, tiada cara wang itu boleh dibayar daripada akaun klien. Dengan itu, bagi memberi kesan kepada perintah Mahkamah Tinggi, permohonan oleh penentang ketiga mestilah dibenarkan (lihat ms 82I dan 83A).]

Notes

For cases on the Malaysian Bar, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1452–1457.

For a case on partnerships between solicitors, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1500.

Cases referred to

Esther Tan Wooi Hong & Ors v Saujana Holding Sdn Bhd & Ors [1997] 1 AMR 697 (folld)

Tan Lay Soon v Kam Mah Theatre Sdn Bhd [1992] 2 MLJ 434 (folld)

Legislation referred to

Accountant's Report Rules 1990
Legal Profession Act 1976 ss 88, 89, 90, 91, 92
Rules of the High Court 1980 O 92 r 4
Solicitors' Account Rules 1990
Solicitors' Account (Deposit Interest) Rules 1990 r 2(2)

Joseph Yeo (*RR Sethu*) for the applicant.
MS Murthi (*Murthi & Partners*) for the first respondent.
KL Ng (*Shui Tai*) for the second respondent/intervener.
S Senivasagam (*Azariah & Associates*) for the third respondent/intervener.

Cur Adv Vult

Nik Hashim JC: This case concerns three applications: encll 2, 13 and 19. Encik Fam Sin Nin ('the applicant') and En Ho Kam Phaw ('the first respondent') were at the material time advocates and solicitors practising in partnership under the name and style of 'Ho & Fam'. On account of differences which arose, they have dissolved the firm. But the funds due to the clients have not been paid out. There are also claims by the clients for interest for non-investment of funds. Neither of the former partners took over the dissolved firm as a going concern; each partner set up his own practice. The bank wants all cheques to be signed by the former partners before any payment can be made and the bank has frozen the accounts.

Each of the former partners was in charge of different areas of the firm: the applicant was in charge of litigation and the respondent was in charge of conveyancing; each did not know what sums were paid by or owing to the clients of the other. Meanwhile, the applicant sought the Bar Council's intervention to take control of the clients' account and clients' properties in the former firm and appoint someone to operate the client's account and repay all monies to the former clients and thereafter close the accounts. The Bar Council, however, refused to intervene and cited that the Legal Profession Act 1976 ('the Act') does not empower the Bar Council to intervene in the manner requested.

Accordingly, the applicant by encl 2 applied to court seeking the appointment of an advocate and solicitor, En Leong Khai Yan:

(i) to operate the clients' account of the dissolved firm Ho & Fam with the various banks and financial institutions set out in the Schedule;

(ii) for the said Leong Khai Yan to be authorized to examine the books of account, files and other records of the firm, and after due inquiries of the applicant and the respondent to ascertain the monies in such accounts due to the various clients and repay the said clients their monies;

(iii) both the applicant and the first respondent extend all assistance and co-operation to the solicitor and the auditors of the firm LH Loo & Co;

(iv) the clients' account of the firm be audited by LH Loo & Co, the auditors of the firm; and

(v) the costs and expenses of the said advocate and solicitor be paid equally by both the applicant and the first respondent.

Encik MS Murthi, counsel for the first respondent, objected to the appointment of the solicitor on the ground that there was no provision allowing such appointment; the Bar Council could appoint under ss 88– 92 of the Act. Learned counsel, however, had no objection to the appointment of the auditors.

It was the contention of En Joseph Yeo, counsel for the applicant, that the court has powers to appoint the solicitor as the agent of both the former partners under the inherent powers of the court to prevent injustice by virtue of O 92 r 4 of the Rules of the High Court 1980 ('the RHC'), and cited *Tan Lay Soon v Kam Mah Theatre Sdn Bhd* [1992] 2 MLJ 434 and *Esther Tan Wooi Hong & Ors v Saujana Holding Sdn Bhd & Ors* [1997] 1 AMR 697 in support.

With respect, I agree with the submission of En Joseph Yeo. Under O 92 r 4 of the RHC, the High Court has inherent powers to make any order to prevent injustice in this case. I think the Bar Council is right in refusing to intervene as the Act does not provide powers for its intervention in such a case. Therefore, the provisions of ss 88–92 of the Act, as argued by En MS Murthi, have no relevance to the present case. The partners have not been guilty of dishonesty in connection with advocates and solicitors' practice; neither are they undischarged bankrupts nor dead. In such situations, the Bar Council is empowered to intervene. The case

before me deals with the assets of the clients in the clients' account of the dissolved firm and the distribution of the clients' monies and the audit of the clients' account under the Solicitors' Account Rules 1990 and the Accountant's Report Rules 1990. Since only a solicitor can operate the clients' account under the Solicitors' Account Rules 1990, a solicitor, in my view, may be appointed as the agent of the former partners. It is clear from the evidence that the first respondent refused to co-operate with the applicant to refund payments to the clients of their respective monies in the clients' account. The clients of the former firm ought not to suffer on account of the disputes between the former partners, namely, the first respondent and the applicant. On the complaint by the first respondent that the appointment is not necessary and that there is no security for the appointment, I wish to say that there is no need for extra security to be imposed on the appointment as the agent to be appointed is an experienced advocate and solicitor and as such, the provisions of the Act and the rules made thereunder are more than sufficient security to take care of him in the discharge of his duty. It would be in the interest of justice that the agent be appointed to operate the clients' account of the dissolved firm and all monies therein be paid out to the respective clients and the accounts audited. Indeed, it is in the interest of both the first respondent and the applicant as well as the clients and of the profession that the clients' account of the dissolved firm be audited and thereafter the accounts can be closed once and for all.

In the result, for the reasons above-stated, I grant the order in terms of the originating summons in encl 2.

Enclosure 13 deals with an application by the intervener client, Marsyal Sdn Bhd ('the second respondent') which claimed for the return of RM585,000 together with interest accrued from the clients' account of the dissolved firm of Ho & Fam. It is to be noted that the money had not been invested in fixed deposit as required by the Solicitors' Account (Deposit Interest) Rules 1990 ('the Rules'). I allowed the money to be returned to the second respondent as agreed by both counsel, but disallowed the interest as the court is not empowered to do so under the Rules. Any claim for interest should be made in other proceedings after the rate of interest has been fixed by the Bar Council (see r 2(2) of the Rules). I also ordered that the costs of this application be borne equally by both the applicant and the first respondent.

Enclosure 19 was an application by another intervener, Lim Julian ('the third respondent'), a client of the former firm. She wanted this court to order both the partners to give effect to the High Court's order dated 19 September 1996 to transfer the trust fund of RM202,735.62 together with interest accrued from the clients' account of the dissolved firm to Amanah Raya Bhd. The applicant supported the application whereas the first respondent objected by saying that the application was not necessary as there was already a court order directing the transfer of the fund. In my view, the objection has no merit. It is true that there is a court order, but unless the first respondent agrees to execute a letter of authorization for the bank to transfer the money to Amanah Raya Bhd, there is no way that

A the money can be paid out from the clients' account. It is pertinent to note here that the applicant was willing to execute the transfer, but the first respondent was not. Thus, in order to give effect to the High Court order, I made the order in terms of the prayer and further ordered that the first respondent bear the costs of this application. Before departing, I would like to observe that these three applications were indeed unnecessary if the B former partners of the dissolved firm had really appreciated their role as advocates and solicitors. Indeed, their paramount duty is towards their clients and clients do expect their solicitors to discharge their responsibility professionally. Whatever the disputes the partners have between themselves they ought to sink them in favour of their clients. In this case, it seems that C the clients did not get what they had hoped for from their lawyers. They were dragged unnecessarily into the partnership dispute over which they had no control and as a result, they suffered. The dispute between the former partners and its consequences to the clients is likened to the old Malay adage: 'Gajah sama gajah berjuang, pelanduk mati di tengah-tengah'. That is exactly what happened in this case.

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Order accordingly.

Reported by Hanim Kamaruddin

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